

# Land Use Planning Perspectives

By *Marvin Duncan*

Land use planning elicits at least two sharply defined and diametrically opposed images. On one hand land use planning is viewed as a subtle attempt to dilute the rights of property holders. The converse view holds that planning is necessary to assure wise use of natural resources now and adequate supplies of these resources for the future. More common are intermediate views, often conditioned by access to ownership and use of property, or the lack thereof. In the last 15 years land use issues, ranging from local feedlot pollution control questions to proposed national land use planning legislation, have created controversy and headlines.

This article examines the historical background and the rationale for land use planning, some considerations in implementing planning, and considers briefly the current status of legislation in the United States. Consequently, the primary focus of this article is on the public sector's role in land use planning. A later article will examine resource use issues of special interest in the Tenth Federal Reserve District, means of addressing those issues, and related legislation in Tenth District states.

## HISTORICAL PERSPECTIVE

The traditional and legislative precedents for private ownership and control of property—and by extension, natural resources—in this country are principally drawn from England. A brief review of

the evolution of ownership rights is useful in understanding how U. S. property rights emerged.

Landholding in medieval England was at best a risky proposition. Land was routinely seized by the crown for failure to pay debts or obey royal summonses. Collection of feudal dues became progressively more oppressive until during King John's reign the nobles revolted, drafting a set of demands (the "Articles of the Barons" in April 1215). The famed Magna Charta emerged from the ensuing negotiations between the king and his loyal barons and mercenaries. Of particular interest to landholders was chapter 39:

**No freeman shall be arrested, or detained in prison, or deprived of his free hold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.'**

Almost as soon as agreed to, the Magna Charta was disavowed by King John, but later a shorter version was enrolled in England's Statutes at Large.

Between 1215 and the colonial exodus to America, attitudes and practices regarding the right of government to regulate the use of, and to seize, private land vacillated between strict and loose construction. A substantial body of royal proclamations

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<sup>1</sup>/Edward Coke. *The Second Part of the Institutes of The Laws of England* (London: printed for E. and R. Brouke, Bell-Yard. New Temple Bar. 1797), p. 45.

and acts of Parliament, particularly directed toward planning for orderly, safe, and healthful urban development, had evolved by the time of the major colonial movement to the new world.<sup>2</sup> A 1580 proclamation by Queen Elizabeth restricted new residential construction within three miles of London's city limits and Parliament, in 1588, restricted new construction to a density no greater than one building to four acres. Regulations restricting access to common land were enacted. As long as land use regulations appeared to promote the public benefit, rather than only the king's benefit, the judicial system supported such regulations.

Interestingly, concurrent with the extensive regulation of land use, a counter movement of revived interest in individual property rights was gaining momentum. There was a revival of interest in the Magna Charta—and an accompanying pre-eminence of individual property owners' rights. Parliament asserted that the ancient laws—the Magna Charta included—were fundamental guarantees of Englishmen's rights and liberties. Thus it was that colonists, fresh from Parliament's victory of private property rights over royal decree, brought to America a concept of property rights that shaped the actions of colonial legislatures during the 1600's. The English tradition also encompassed substantial control over private property for the public good, and in England the pendulum was soon to swing toward renewed attention to public prerogatives. Americans for the past 200 years have, however, considered the concept of property rights brought by colonists to be among our most prized acquisitions from England.

Nonetheless, land use restrictions were accepted early in the American colonies.<sup>3</sup> As early as 1631, the Virginia House of Burgesses passed an act requiring each white male over 16 to grow two acres of corn—or forfeit an entire tobacco crop. New Amsterdam in 1647 passed what amounted to zoning and building code ordinances. However, the expanse of free land and readily available resources

to the west minimized consideration of any comprehensive land or resource use planning. It was not until the closing of the American frontier—around 1900—that the country gave any serious consideration to conservation of natural resources.

Coincident with, and partly because of, the closing of the frontier, public sentiment for preserving unique and unspoiled parts of the American wilderness led to Congressional action in 1891 setting land aside for national parks and forests. The Reclamation Act of 1901, a legislative landmark, established the pattern for developing water resources in the western United States. However, urban zoning—as a result of early acceptance and the higher visibility of urban land use problems—dominated land use discussion and practice until the 1960's.

Comprehensive land use planning encompassing resource inventory, data collection, and citizen participation was begun in rural America during the 1930's. It made only limited progress before public attention was turned toward winning World War II. Postwar emphasis on economic growth meant that not until the 1960's—when urban land use problems began to spill over into rural areas as suburban sprawl, city landfills, highways, and airports—was there a vigorous revival of public interest in land use issues. Robert G. Healy suggests people were becoming more aware of the fragility and interrelationships in their environment, as they began to lose their access to and enjoyment of the out of doors, something they had taken for granted.<sup>4</sup>

## **U. S. PROPERTY RIGHTS**

Property rights in the United States can best be likened to a bundle of individual rights—the rights to sell, to produce with, to bequeath, to profit from use, etc. However, the states did not relinquish all of the rights in this bundle when selling land to private parties. The retained right—police power, taxation, eminent domain, and escheat—though probably interpreted more broadly today by courts,

<sup>2</sup>Fred Bosselman, David Callies, John Banta, *The Taking Issue* (Washington: The Council on Environmental Quality, 1973), pp. 60-81.  
<sup>3</sup>*Ibid.*, pp. 82-104.

<sup>4</sup>Robert G. Healy, "Controlling the Uses of Land," *Resources*, Vol. 50 (Washington: Resources for the Future, Inc., October 1975), pp. 1-3.

have always rested with the states. The exercise of these retained government rights gives viability to comprehensive land use planning.

### Retained Rights

**Police Power.** Though exercised primarily by the state, police power is available to all levels of government. Governments can and do limit personal and property rights in the interest of public health, safety, and welfare. Easements guaranteeing or prohibiting certain land uses are common. All zoning legislation derives from the right of government to exercise police power subject to due course of law. The exercise of this power recently has infringed so deeply into what had been considered private property rights that questions have been raised regarding the limits to which this power may be extended, without constituting unlawful taking of private property.<sup>5</sup> Just as public attitude on land use evolves over time, so do court decisions. An examination of property rights cases decided at several judicial levels convinced the authors of *The Taking Issue* that a substantial body of court decisions may be shifting toward support for the present exercise of police power.

Our strongest impression . . . is that the fear of the taking issue is stronger than the taking clause itself. It is an American fable or myth that a man can use his land any way he pleases regardless of his neighbors. That myth survives, indeed thrives, even though unsupported by the pattern of court decisions.

Although the number of cases is still small, there is a **strong** tendency on the part of the courts to approve land use regulations if the purpose of the regulation is statewide or regional in nature rather than merely local. . . . they show an obvious preference for regulations having broad multipurpose **goals**.<sup>6</sup>

**Taxation.** Governmental units have reserved the right to levy and collect taxes on real property. Though designed primarily to raise revenue, taxation can be used effectively to control land use.

Differential assessments and tax credits can delay use shifts, while lack of preferential tax treatment can force development to that use with the highest discounted return over the planning horizon—the highest and best use.

**Eminent Domain.** The right of government to take private property for public use—in this country only after just compensation to the owner—is widely used in acquiring land for highways, dams, and other public purposes.

**Escheat.** This refers to the reversion of property to the state when there are no longer persons legally entitled to hold the property. Though one of the bundle of property rights retained by the state, it has little impact on land use planning.

**The Spending Power of Government.** Though not generally included in a listing of retained property rights, governmental spending patterns have increasingly influenced land use. Public works projects such as harbors, navigable waterways, national defense installations, and land reclamation projects have had large scale impacts on use patterns of both contiguous land and other land in the same general area.

### External Effects

The renewed attention to the public welfare has, in part, resulted from a recognition of what economists call externalities.<sup>7</sup> Externalities occur when the benefits and costs that govern the decisions of a private individual are not the same as those experienced by society. Such decisionmaking can result in **unearned** benefits accruing to, or undeserved costs born by, the participants. For example, a chemical plant may find its operation very profitable because it can dispose of pollutant wastes

<sup>7</sup>/Excellent sources for further discussion of externalities and their effects on resource use are Robert U. Ayres and Allen V. Kneese, "Production, Consumption, and Externalities," *American Economic Review*, Vol. 59, No. 3, June 1969, pp. 282-97; Francis M. Bator, "The Anatomy of Market Failure," *Quarterly Journal of Economics*, Vol. 72, August 1958, pp. 351-79; Michael F. Brewer, "Agrisystems and Ecoculture, or: Can Economics Internalize Agriculture's Environmental Externalities," *American Journal of Agricultural Economics*, Vol. 53, No. 5, December 1971, pp. 848-58; R. H. Coase, "The Problem of Social Cost," *Journal of Law and Economics*, Vol. 3, October 1960, pp. 1-44; and E. J. Mishan, "Spillover: Affliction of the Affluent Society," *Technology and Growth: The Price We Pay. Part II* (New York: Praeger Publishing Co., 1970), p. 29ff.

<sup>5</sup>/The Fifth Amendment to the U. S. Constitution ends with the phrase "nor shall private property be taken for public use without just compensation."

<sup>6</sup>/The *Taking Issue*, pp. 318-19, and p. 323.

into a nearby stream. However, neighboring users of the stream must bear the cost of removing the pollutants in order to use the water, or forego the benefits from use of the water. Thus, the chemical manufacturer is making production decisions, and chemical consumers are making consumption decisions, based on a cost of production that is less than the actual and full cost society must bear in order to use the product.

Land use problems are characterized by such externalities. The decisionmaking unit—the farmer, the mining company, the manufacturing plant, the real estate developer—is usually too small to encompass all the costs or benefits of its resource-use decisions. Externalities can also result from the timing of the flow of benefits and costs to a firm. A coal mining firm may hesitate to undertake spoil bank reclamation, in part because its planning horizon may be too short to capture the benefits flowing from the reclamation. Institutional structures may also cause externalities. Actions by one political subdivision in a river flood plain or over an underground aquifer may impose costs on members of surrounding political subdivisions.

### LAND USE PLANNING

Goals of society change over time, as is shown by the recent concern for environmental protection and the emerging energy conservation ethic. Just as goals change over time, so does public perception of the state's authority to use those property rights it retained—to be exercised in the public interest. Constraints are placed on (or in some instances, removed from) the market system of resource allocation to achieve carefully defined objectives.<sup>8</sup> The constraints are purposeful, not randomly imposed, and are intended to enhance achievement of publicly stated goals and to have predictable results—results that are capable of change over time. Basic achievements desired are the restoration of land and protection of resource quality, to meet the needs of the next user.

8/John F. Timmons and J. M. Cormack, "Managing Natural Resources Through Land Tenure Structures," *Journal of Soil and Water Conservation*. Vol. 26. No. 1, 1971, pp. 4-10.

Land use planning begins with an inventory of available resources and a determination of their levels of use. Planners then identify long-range goals and shorter-term objectives. Constraints are placed on the market mechanism that are intended to lead to an allocation of resources in accordance with stated goals and objectives. Both private and public benefits and costs resulting from a decision must be considered. In some cases administered resource allocation may be necessary. Trade-offs between maintaining the environment in pristine condition and judicious development of resources, while assuring subsequent users of adequate resource quality, are arrived at. Indeed, judicious development may improve the quality and productivity of the land. Wide public participation in identifying goals and objectives, as well as in determining acceptable development-environmental quality trade-offs, is necessary to achieve workable, effective land use plans.

### Dimensions of Planning

Whenever public action for land use planning places constraints on an unimpeded market mechanism for allocating resources, five major questions—the dimensions of land use planning—must be addressed.<sup>9</sup>

**Scope.** Planners must decide whether to plan separately for parts of a land use system, or to include all separate issues in a comprehensive plan. Typically, partial planning may at first be more easily accepted. The need to plan for sewage systems or transportation systems is readily apparent. Less apparent, but nonetheless real, is the need to consider how partial planning for one purpose may mandate the eventual plan for another purpose. Major partial land use plans need to be compatible. Consequently, successful land use planning will usually include the major issues to be resolved.

**Level.** Historically, land use decisions have been made at city and county levels within carefully defined authority from the state. However, some

9/Neil E. Harl, "Land Use Legislation: Status and Implementation," paper presented at annual meeting of Mississippi Section, American Society of Agronomy, Mississippi State University, January 28, 1975.

decisions—such as sewage treatment and flood control—may have effects beyond local decisionmaking boundaries. Obviously, different types of decisions must be made at different levels. A creative balance should be attempted in which the level of decisionmaking includes all the costs and benefits of the decision, while being done at the lowest practical level.

**Criteria.** It is essential that planning decisions be based on well-defined criteria. These may either be explicitly stated or implicit in legal constraints imposed upon the market system. If high levels of economic growth are desired, resources would have to be allocated to uses where the returns are greatest. In contrast, a desire for preservation of scenic areas might require that resources be allocated quite differently. Levels of economic growth, sustainable over time, may require still different resource allocation patterns.

**Time.** The time frame over which decisionmaking is optimized affects the resultant plans. Environmentalists prefer a several-generation planning horizon accompanied by very low interest rates in order to demonstrate positive benefit cost ratios for projects. Those interested in high levels of economic growth would opt for a much shorter planning horizon, accepting higher interest rates, since they contend technological change would likely make long horizon plans obsolete.

**Means.** A wide variety of means exists to implement land use planning decisions. Those property rights retained by the state can be used singly or in combination to constrain market solutions or impose legal restrictions. Police power, taxation, eminent domain, and government spending all find ready use as means of implementing planning decisions. Indeed, public opinion and legal **practice**—under continued redefinition—have in recent years supported increasingly vigorous exercise of publicly retained property rights. Increasing public attention is being directed toward resource use practices that irretrievably alter future availability or use patterns of the resource. Governmental units, including the courts, have evidenced a greater willingness to intervene in those situations.

## Federal-State Environmental Legislation

Environmental legislation—attempting to deal with unpriced benefits and costs of resource use—is also an effort to limit or plan uses that permanently alter the character of the resource. Major Federal air and water pollution control initiatives began with the Water Pollution Control Act of 1948, making loans available for treatment plant construction. The Federal Water Quality Act of 1965 made grants available for waste water treatment. A long series of legislative actions including the National Environmental Policy Act and executive creation of the Environmental Protection Agency in 1970, the Federal Water Pollution Control Act Amendments of 1972, and Coastal Zone Management Act of 1972 have resulted in uniform Federal **standards** for air pollution, effluent limitations at each identifiable point from which pollutants are discharged, discharge permits, and timetables for meeting new standards and limits. Thus, the Federal Government has exercised its control over resource use to enhance the quality and availability of water and air resources for present and future users.<sup>10</sup>

To the extent such legislation has required formulation of **state**—or enforcement of Federal—regulations, resource use planning at a state level has moved beyond where it might otherwise have been. In some instances, continued access to Federal funds has been contingent upon development of state pollution control plans. However, it must be conceded that many air and water pollution problems defy resolution at a state or **substate** level, and thus a national or regional approach is required.

Oklahoma pollution control legislation is an example of this Federal-state relationship. That state has enacted a number of environmental control acts.<sup>11</sup> The 1969 Oklahoma Feed Yards Act requires licensing of feedlots with capacities of 250 head or more (cattle, swine, sheep, and horses). Operators granted licenses are required to control

10/*Agriculture In The Environment*. No. 481, Economic Research Service, U. S. Department of Agriculture, July 1971.

11/Dean Barren and Dan Badger. "Environmental Regulations Affecting Land Use." *O. S. U. Extension Facts*. No. 808, Oklahoma State University. 1975.

pests and diseases, prevent runoff pollution, properly dispose of animal waste, and have proper facilities to conduct operations in conformance with this act, regulations of the State Board of Agriculture, and accepted industry standards. The Oklahoma Solid Waste Management Act of 1970 outlined regulations for disposition of solid wastes such that the public health and welfare are protected, disease and nuisances are controlled, natural resources conserved, pollution prevented, and the beauty and quality of the environment enhanced. The Oklahoma Clean Air Act establishes controls on burning of refuse and other combustible materials. These state laws augment and implement the various Federal environmental quality legislation.

### **CURRENT LEGISLATIVE STATUS**

Comprehensive Federal land use legislation has not been passed by Congress, although the Senate has twice passed legislation, in 1972 and 1973, that would have aided state land use planning and provided for better coordination of Federal programs and projects significantly affecting land use. Currently two land use planning bills are before the Congress—S. 984, The Land Resource Planning Assistance Act in the Senate, and H. R. 3510, The Land Use and Resource Conservation Act of 1975 in the House. Both pieces of proposed legislation would establish a Federal grant program to assist states in taking an inventory of land resources, retaining professional staffs, developing land use goals and objectives, and implementing programs for critical areas and for uses of more than local concern. Both bills recognize the role of state and local government in the planning process. Authority is provided under both proposed bills to assure that major Federal programs and activities affecting land use are consistent with state land resource programs. The proposed legislation may be viewed as a logical extension of the Coastal Management Act of 1972 under which coastal states are developing land use programs for their coastal zones.

Comprehensive Federal land use legislation has been slow in coming, largely because legislators are reluctant to inject Federal authority into what has

been viewed as a state issue. Consequently, the legislation presently under consideration in Congress is enabling in nature, proposing assistance to states involved in comprehensive land use planning. The testing ground for such legislation has thus been in state legislatures. A number of states have moved quietly and creatively in the past 15 years to build a legislative framework in which responsible planning can occur. The Colorado land use legislation of 1974 is an example.

The Colorado General Assembly enacted the state's first comprehensive land use law, H. B. 1041, recognized as among the most comprehensive in the nation. The state designated 13 types of areas and activities as matters of state interest. They are: mineral resource areas, natural hazard areas (flood, geologic, forest fire), historic and archaeological sites, wildlife habitats, airports, public utilities, highways and interchanges, mass transportation facilities, water and sewage facilities, solid waste sites, new communities, water projects, and nuclear detonations. Under terms of the legislation:

First, local governments—counties and municipalities—are given money, encouragement, and direction to plan for/designate and regulate (these) certain specified land use matters. . . . Second, state power to intervene is no longer limited to narrowly defined emergency situations; . . . the executive branch is given authority to force local governments to deal with these matters. Third, state agencies with experience in identifying and managing mineral, natural resource, and hazardous areas are brought into a coordinated program to make their information and expertise available to local governments.<sup>12</sup>

A companion piece of legislation, H. B. 1034, the Local Government Land Use Control Enabling Act of 1974, was also passed to assure local governments that they did indeed have ample authority to deal with modern day land use problems. Local governments were given authority to protect wild-

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<sup>12</sup>John R. Birmingham, "1974 Land Use Legislation In Colorado," *Denver Law Journal*, Vol. 51, No. 4. The University of Denver College of Law, 1974, pp. 467-507.

**Table 1**  
**STATUS OF STATE ACTIVITY RELATED TO**  
**LAND USE MANAGEMENT\***

Enabling Legislation						Functional Programs							
State	Municipalities	Counties	Regional Agency Advisory Only	Regional Agency Review Authority	Procedures for Coordinating of Functional Programs	Land Use-Value Tax Assessment law	Surface Mining	Flood Plain Regulations	Power Plant Siting	Wetlands Mgmt.	Critical Areas	Coastal Zone Mgmt. Program Participation	State Land Use Program (see Code)
COLO.	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes	N/A	2a-c
KANS.	Yes	Yes	Yes	No	No	No	Yes	No	No	No	No	N/A	1
MO.	Yes	Yes	Yes	No	No	No	Yes	No	Yes	Yes	No	N/A	1
NEBR.	Yes	Yes	Yes	No	No	Yes	No	Yes	Yes	No	No	N/A	1
N. MEX	Yes	Yes	Yes	No	Yes	Yes	Yes	No	Yes	No	No	N/A	1
OKLA.	Yes	No	Yes	No	No	No	Yes	Yes	No	No	No	N/A	1
WYO.	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	No	No	N/A	2a-d

**N/A** Not available.  
State Land Use Program Code:  
1. Study (executive or legislative) or state legislative consideration in progress.  
2. State land use program legislation enacted.  
Authorization for:  
(a) inventorying existing land resources, data, and information collection  
(b) policy study or promulgation by agency or commission  
(c) identification of land areas or uses of more than local concern  
(d) regulation or management of land areas and uses identified  
(e) direct state implementation or state review of local government implementation  
\*Comparable data for all 50 states can be found in Environmental Comment, The Urban Land Institute, Washington, D. C., October 1975.  
SOURCE: U. S. Department of Interior.

life habitats, historic and archaeological locations, and limit development of areas hazardous to man. Further authority was given to regulate land use on the basis of its impact on the surrounding area.

The carrot and stick combination—substantial financial and technical support to local planning bodies and the authority of the state to take a local government to court to force consideration of critically important issues, as defined by the legislature—is a potent combination in support of comprehensive and issue-oriented planning. For example, local governments wishing to control mining activities may use a range of options from zoning, to developing a master plan for mining, to use of state regulations that may be applicable under the Colorado Open Mining Land Regulation Act of 1973.

Responding to needs within their states, legislators and governors in 49 states have undertaken study or legislative consideration of state land use

programs. Legislatures in nine additional states have enacted comprehensive state land use legislation. All the Tenth District states have such legislation under consideration or enacted (Table 1). Concern over mining, industrial development, and urban growth has prompted Colorado and Wyoming to pass legislation, among the most comprehensive in the nation, authorizing (a) taking an inventory of land resources, and data collection, (b) policy study or promulgation, (c) identification of land areas or uses with more than local concern, and in the case of Wyoming, (d) regulation or management of land areas and uses identified. Additionally, some Tenth District states have enacted a number of functional programs related to surface mining, powerplant siting, flood plain development, land assessment, and pollution control to address present and emerging land use issues at state and substate levels.

## **SUMMARY AND CONCLUSIONS**

Changing public attitudes toward ownership rights and public control over certain of those rights have been characterized as "the quiet revolution." The changes in attitude and practice have been substantial. The public role in land use planning is greater now than at any time in U. S. history. Legislation affecting such change has taken place largely at state and local levels, close to those affected by such changes and the problems initiating them. It must be conceded, however, that Federal pollution control legislation has forced the hands of state governments to some degree. Court decisions have generally supported the concept of restricting private ownership rights to benefit the public welfare, as long as such restrictions are in accord with evolving legal concepts and American **tradition**—

the "taking issue" has been substantially defused. Though land use legislation is often vigorously contested, wide participation by citizens usually characterizes its consideration, enactment, and implementation. Consequently an arena of public opinion is provided in which differences can be minimized and a common purpose forged.

State land use planning legislation is presently under study or has been enacted in 49 states. The more comprehensive legislation of California and Hawaii—and Colorado and Wyoming, in the Tenth District—may well be the direction of the future for land use planning. A wide range of state enabling legislation and specific program legislation, aimed at redressing particular problems—such as strip mining—are already in place. A subsequent article will examine Tenth District states' response to a number of resource use issues.